

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:)	Chapter 11 Case
)	Number <u>90-60484</u>
JAMES SCOTT LIVINGSTON, JR.)	
)	
Debtor-in-Possession)	
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JAMES SCOTT LIVINGSTON, JR.)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>90-6025</u>
CENTRAL BANK OF SWAINSBORO)	
CITIZENS FIDELITY BANK AND)	
TRUST COMPANY, AND FABWELL, INC. ¹)	
)	FILED
)	at 4 O'clock & 50 min P.M.
Defendants)	Date: 3-30-92
)	
)	

ORDER AND JUDGMENT

Plaintiff, James Scott Livingston, Jr., debtor-in-possession in the underlying Chapter 11 case, brings this adversary proceeding against Central Bank of Swainsboro, hereinafter "Central Bank," and Citizens Fidelity Bank and Trust Company, hereinafter "Citizens Bank," seeking a determination as to the validity, priority and extent of the lien of Citizens Bank and an award of damages against Citizens Bank pursuant to 11 U.S.C.

¹By order dated May 15, 1991 Fabwell, Inc. was dismissed as a defendant.

§362(h) for an alleged violation of the automatic stay of 11 U.S.C. §362(a).

The parties have entered into stipulations, 39 in number, attached as exhibit "A" to the consolidated pretrial order dated July 5, 1991, which stipulations are incorporated by reference in this order and judgment as if stated verbatim. In addition to the stipulations, based upon the evidence presented at trial, I make the following findings.

Citizens Bank made a loan of Thirty Thousand and No/100 (\$30,000.00) Dollars to J. Scott Livingston and Metal Masters, Inc., hereinafter "Metal Masters," for the purchase of real property known as Lot No. 30 Shannon Oaks Subdivision, Mercer County, Kentucky, and a loan of One Hundred Eight Thousand and No/100 (\$108,000.00) Dollars for the construction of a building on the real property. J. Scott Livingston and Metal Masters, as co-makers, executed two notes which together evidenced the total indebtedness to Citizens Bank for the loans. Although J. Scott LIVINGSTON was jointly and severally liable on the two notes, Metal Masters acquired title to the real property and improvements as sole owner. In connection with each note, Metal Masters executed a mortgage on the real property in favor of Citizens Bank. Each mortgage contains the following language:

That in order to secure mortgagee [Citizens Bank] of the following indebtedness, together with the indebtedness, if any, and all other obligations hereinafter set forth:

Mortgagor's [Metal Masters'] Promissory Note .
. . as set out therein . . . until paid in

full.

. . .
(7) This mortgage further secures, in addition to the original amount of the loan herein stated, all interest thereon, and all renewals thereof, all extensions of said loan and the note evidencing it, and such additional sums as hereafter may be loaned by the mortgagee or its successors in title to the mortgagor either as principal or otherwise, not to exceed \$_____, in addition to the original amount of the loan, to the extent indicated or otherwise noted on the debt instruments.

The notes and mortgages were executed in Kentucky and each note, as well as each renewal note discussed below, provides "[t]his note shall be governed by the laws of the State of Kentucky." On February 10, 1988, following a series of renewals of the original notes, Metal Masters and J. Scott Livingston executed a note to Citizens Bank ("the February 10, 1988 note") renewing the outstanding indebtedness. It is stipulated that the real estate described in the above referenced mortgages secured the February 10, 1988 renewal note, as well as all previous renewal notes.

Subsequent to February 10, 1988, J. Scott Livingston and Charles Ranew entered into an agreement whereby Mr. Ranew would provide capital to the corporate entity, Metal Masters.² The transaction required that the real estate with all improvements be transferred from the corporate entity to J. Scott Livingston and

²For the purpose of resolving the issue before me it is not necessary for me to determine whether the money transferred from Mr. Ranew to the corporation was a loan or purchase of stock.

Nita Livingston individually and that the individuals assume the Mortgages to Citizens Bank. The sole purpose of the transfer was to relieve the corporation of the debt obligation to Citizens Bank. In furtherance of the agreement, a deed was executed transferring the real estate, which deed provided in part:

[T]he Grantor [Metal Masters] for and in consideration of One Dollar (\$1.00), cash in hand paid, receipt of which is hereby acknowledged, and the further consideration of the assumption of mortgages in favor of Citizens Fidelity Bank and Trust Company Mercer County, dated December 29, 1986, at [Mortgage Book] 159, page 577 and December 29, 1986, at [Mortgage Book] 160, page 258, with current unpaid balance of \$128,034.57, has BARGAINED and SOLD, and does by these presents, alien and convey unto the Grantees [J. Scott Livingston and Nita Livingston] and upon the death of either, then to the survivor in fee simple, his or her heirs and assigns forever, the following described real estate in Mercer County, Kentucky [the real estate].

Contemporaneous with the execution of the deed, J. Scott Livingston and Nita Livingston executed a note to Citizens Bank dated March 20, 1989 in the amount of One Hundred Twenty-Eight Thousand Thirty-Four and 57/100 (\$128,034.57) Dollars ("the March 20, 1989 note"). The note on its face (see exhibit 15) provides that "[t]his loan is secured by two real estate mortgage[s] on commercial property located in Mercer Co., Ky. dated 11/29/86 and 12/29/86." No new mortgage was executed by the owners, J. Scott Livingston and Nita Livingston, to secure the March 20, 1989 note. It was the intent of the parties to the transaction, Charles Ranew, J. Scott Livingston,

Nita Livingston, Metal Masters and Citizens Bank that Mr. Ranew become a 50% shareholder in the corporate entity, Metal Masters; that the corporate entity transfer the real estate to J. Scott Livingston and Nita Livingston; that J. Scott Livingston and Nita Livingston assume the outstanding mortgages in favor of Citizens Bank; that a new note be executed, the March 20, 1989 note, relieving the corporate entity of the debt due Citizens Bank; and that J. Scott Livingston remain personally liable on the debt.

Subsequent to the closing of the transfer of the real estate from Metal Masters to the Livingstons, by promissory note and mortgage dated February 14, 1989, the Livingstons became indebted to Central Bank in the principal sum of Forty-Three Thousand Two Hundred Sixty-Three and 42/100 (\$43,263.42) Dollars (see stipulation No. 21), which second mortgage provided

[t]his is a second mortgage subordinate and inferior to mortgages in favor of Citizens Fidelity Bank & Trust Company Mercer County, dated December 29, 1986,³ recorded in [Mortgage Book] 159, page 577, and December 29, 1986 recorded in [Mortgage Book] 160, page 258, said records.

It was the intent of the parties to this loan that the security interest granted Central Bank be subordinate to a security interest held by Citizens Bank.

³Central Bank's mortgage, as well as the deed transferring ownership of the real estate, provides that the mortgage recorded in Mortgage Book 195, page 577 is dated December 29, 1986. The correct date is November 29, 1986 (see stipulations No. 10, 12, 14 and 16 and exhibit 4).

On October 2, 1990 J. Scott Livingston filed for protection under Chapter 11 of the Bankruptcy Code. Citizens Bank filed a proof of secured claim for One Hundred Twenty Five Thousand Three Hundred Twenty Four and 65/100 (\$125,324.65) Dollars. Prior to the filing of the Chapter 11 petition in the underlying case, Citizens Bank commenced a foreclosure proceeding in Kentucky in the 50th Judicial Circuit Court, Mercer County, (the "Kentucky State Court") (case No. 90-CI-215) naming J. Scott Livingston as one of several defendants. Pending in the Kentucky State Court in the foreclosure action at the time J. Scott Livingston filed his bankruptcy petition was a motion for summary judgment filed by Citizens Bank. Prior to the hearing on Citizens Bank's motion for summary judgment, Citizens Bank through its representative, John W. Robertson, and Citizens Bank's attorney of record in the foreclosure proceeding, had knowledge of the pendency of the bankruptcy case filed by J. Scott Livingston. On October 5, 1990, with knowledge of J. Scott Livingston's bankruptcy petition, Citizens Bank proceeded with the hearing in the Kentucky State Court on its motion for summary judgment, which was denied.

CONCLUSIONS OF LAW

The debtor contends that the promissory note of March 20, 1989 relieving Metal Masters of the debt was a novation under

Kentucky law extinguishing the mortgages securing the original debt of Metal Masters and, pursuant to the strong arm clause of 11 U.S.C. §544, that he may avoid the mortgage liens of Citizens Bank. A novation has not occurred in this case. Pursuant to §544(a)(1),⁴ the trustee may avoid the interest of any creditor in property which under §541(a) is property of the bankruptcy estate if under applicable state law a judgment lien creditor would have a superior interest. See generally 4 Collier on Bankruptcy, ¶¶544.01, 544.02 (L. King 15th ed. 1991). Citizens Bank does not dispute that the

⁴11 U.S.C. §544(a) provides:

(a) The trustee shall have, as of the commencement of case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor of any obligation incurred by the debtor that is voidable by -

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

real estate is property of the bankruptcy estate. The debtor-inpossession, J. Scott Livingston, clothed with the rights and powers of the trustee, 11 U.S.C. §1107(a), may avoid the interest of Citizens Bank in the real estate pursuant to §544(a)(1) if under applicable state law a judgment lien creditor as of the date of debtor's Chapter 11 filing would have a superior interest than that of Citizens Bank. The burden of proof is on the debtor-inpossession to establish under state law a superior interest than that of the creditor whose interest is sought to be avoided. See Matter of Woodlands Inv. Associates, 95 B.R. 678, 680 (Bankr. W.D. Mo. 1988).

The choice of law rules of the forum state, Georgia, determine what state law applies. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.E. 1477 (1941); American Family Life Assurance Co. v. U.S. Fire Co., 885 F.2d 826 (11th Cir. 1989). As the real estate is located in the State of Kentucky, the notes and mortgages involving Citizens Bank were executed in Kentucky, and provide that they are governed by Kentucky law, under Georgia's choice of law rules the law of Kentucky is the applicable law. See Gregg v. Fitzpatrick, 187 S.E. 730 (Ga. App. 1936); see also Federal Deposit Ins. Corp. v. Lattimore Land Corp., 656 F.2d 139, 149 n. 16 (5th Cir. Unit B. 1981).

In Kentucky, "a recorded mortgage takes priority over any subsequent creditors," Midland-Guardian Co. v. McElroy, 563 S.W.2d 752, 754 (Ky. App. 1978), but an unrecorded mortgage is invalid

against a judgment lien creditor without notice of the mortgage. See Kentucky Revised Statutes Annotated (KRS) §382.270.⁵

Debtor does not dispute that the two mortgages executed by Metal Masters securing the February 10, 1988 renewal note were properly recorded pursuant to Kentucky law. However, it is stipulated that no new mortgage was executed to secure the March 20, 1989 note of J. Scott Livingston and Nita Livingston. Thus, the issue presented is whether the claim of Citizens Bank against J.

Scott Livingston in the underlying Chapter 11 case based on the

⁵KRS §382.270 provides:

No deed or deed of trust or mortgage conveying a legal or equitable title to real property shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed or mortgage is acknowledged or proved according to law and lodged for record. As used in this section [382.270] "creditors" includes all creditors irrespective of whether or not they have acquired a lien by legal or equitable proceeds or by voluntary conveyance.

The language "without notice thereof" in KRS §382.270 is positioned so that it appears to apply only to a "purchaser for valuable consideration," but applies as well to "creditors." Sears v. Cain, 47 S.W.2d 513 (Ky. App. 1932); Borg-Warner Acceptance Corp. v. First Nat. Bank of Prestonburg, 577 S.W.2d 29 (Ky. App. 1979). Citizens invalid, the March 20, 1989 promissory note and renewal promissory note of March 20, 1990 (see note 6, infra) contain a grant of a security interest in the real estate and is binding on the parties to the note. However, the notes were never "lodged of record." KRS §382.270, supra. Clearly, KRS §382.270 and 11 U.S.C. § 544(a) defeat a claim of a lien asserted by Citizens Bank under the language of its promissory notes alone.

outstanding obligation for the March 20, 1989 note⁶ of J. Scott Livingston and Nita Livingston is secured by virtue of the two mortgages executed by Metal Masters which secured the February 10, 1988 note.

For the debtor to succeed he must establish that the March 20, 1989 note constitutes a novation of the February 10, 1988 note, extinguishing the debt evidenced by the February 10, 1988 note and the mortgages securing that debt. Debtor maintains that the claim of Citizens Bank is unsecured and that the mortgage executed in favor of Central Bank on the real estate is a first mortgage. Citizens Bank argues that the March 20, 1989 note was a renewal rather than a novation of the February 10, 1988 note. Citizens Bank contends that the intent of the parties controls and therefore, the mortgages executed by Metal Masters secure the March 20, 1989 note.

Under Kentucky law, novation occurs when a debtor and creditor mutually agree to extinguish an obligation of the debtor and create a new debt. Nolin Production Credit Ass'n v. Citizens Nat. Bank of Bowling Green, 709 S.W.2d 466, 467 (Ky. App. 1986);

While v. Winchester Land Dev. Corp., 584 S.W.2d 56, 63 (Ky. App.

⁶On March 20, 1990 J. Scott Livingston and Nita Livingston executed a note in the amount of One Hundred Eighteen Thousand Three Hundred One and 13/100 (\$118,301.13) Dollars renewing the March 20, 1989 note. No mortgage was taken. The outstanding indebtedness of J. Scott Livingston and Nita Livingston to Citizens Bank is One Hundred Twenty-Five Thousand Three Hundred Twenty-Four and 65/100 (\$125,324.65) Dollars, plus interest accrued since October 2, 1990, see stipulation No. 23.

1979). Novation may be accomplished, for example, by substitution of a new obligation, a new debtor, or a new creditor. In re: Cantrill Construction Co., 418 F.2d 705, (6th Cir. 1969), cert. denied, 397 U.S. 990, 90 S.Ct. 1124, 25 L.E.2d 398 (1978); In re: Tabers, 28 B.R. 679, 681 (Bankr. W.D. Ky. 1983). The essential element, however, in determining whether novation took place as opposed to renewal is the intent of the parties. Nolin Production Credit Ass'n, White, Cantrill Construction Co., supra; In re: Littlejohn, 20 B.R. 695 (Bankr. W.D. Ky. 1982); In re: Hobby, 18 B.R. 70 (Bankr. W.D. Ky. 1982). If the parties intend that the old debt be extinguished rather than renewed, novation occurs. Nolin Production Credit Ass'n, White, Cantrill Construction Co., supra. The burden of proof is on the party alleging novation to establish novation by a preponderance of the evidence. Kirby v. Scroggins, 246 S.W.2d 453, 455 (Ky. S.Ct. 1952); In re: Sanders, 28 B.R. 685, 687 (Bankr. W.D. Ky. 1983).

Although novation of a debt obligation extinguishes any mortgage securing the debt, Nolin Production Credit Ass'n, supra, at 467, "[i]n all cases where a loan is secured by a real estate mortgage, the mortgage originally executed and delivered by the borrower to the lender shall secure payment of all renewals and extensions of the loan and the note evidencing it, whether so

provided in the mortgage or not." KRS §382.520(1) (Emphasis added).⁷ Therefore, if the March 20, 1989 note was a renewal of the February 10, 1988 note, under Kentucky law the mortgages which secured the February 10, 1988 note also secure the March 20, 1989 note.

The purpose of the March 20, 1989 note was to release the corporate entity, Metal Masters, of liability on the February 10, 1988 note in order to induce Mr. Ranew to invest capital in the corporate entity.⁸ Citizens Bank agreed to release Metal Masters

⁷Although it is not necessary under Kentucky law for a mortgage to expressly provide that renewals of the note secured by a mortgage are also secured by the mortgage, in this case the mortgages executed by Metal Masters expressly provide that any renewals of the notes would be secured.

⁸John W. Robertson, assistant vice president and loan officer at Citizens Bank, testified on cross-examination as follows:

Q. Why did Mr. Livingston want to take this property [the real property] out of Metal Masters?

A. He came to us and indicated that he was bringing another individual [Mr. Ranew] into the business who would be a shareholder and was bringing some additional capital into the business [Metal Masters] and that the partner, if you will, did not want to be liable and obligated on these notes as a corporate liability.

Q. So in other words, he wasn't going to buy into the corporation if the corporation was indebted to Citizens Bank for over \$100,000 secured by this property?

A. Basically, yes.

Q. So the purpose was to take the property out of Metal Masters and put it into Mr. Livingston, so that when Mr. Ranew bought into the company, the company would not owe that debt?

A. That is correct.

from liability on the February 10, 1988 note and, in exchange, accept a note, the March 20, 1989 note, from J. Scott Livingston and Nita Livingston individually.⁹ However, unlike any Kentucky case

Q. And that was accomplished by the company giving Mr. Livingston and Mrs. Livingston a deed to that property and Citizens making a new note - new loan to them to cover the debt to Citizens Bank; is that correct?

A. There was a replacement note, yes, for the same amount.

Q. A replacement note for the same amount, replacing Scott and Nita Livingston as the debtors for Metal Masters so that Metal Masters would not longer owe the debt?

A. At the time Scott and Nita Livingston were co-borrowers to the original loan anyway. It appears that some of the notes they have not both signed each time, but they were co-borrowers to the note. We were simply accommodating Mr. Livingston at this request.

A. Relieving Metal Masters of the debt, placing it all on Scott and Nita [Livingston] so that Mr. Ranew would buy into the company and put some more capital in?

A. That is correct.

⁹Citizens Bank relies on American Fidelity Bank & Trust Co. v. Hinkle, 747 S.W.2d 620 (Ky. App. 1988) in arguing that Metal Masters was not released from the February 10, 1988 note because there was no formal cancellation and renunciation pursuant to KRS §355.3-605. Because there was no formal release of Metal Masters' debt, Citizens Bank contends, no novation occurred. However, in American Fidelity Bank & Trust Co., novation was not alleged. Id. at 621. Compliance with KRS §355.3-605 is not necessary to effect a novation, a Kentucky common law doctrine which applies without regard to KRS §355.3-605. See Nolin Production Credit Ass'n, White, Cantrill Construction Co., supra. Likewise, novation does not require formally releasing the mortgage of record pursuant to KRS §382.360. See Watt's

cited by the parties or located by the court, while the parties in this case clearly intended to release Metal Masters of its debt obligation under the February 10, 1988 note, it was also intended that J. Scott Livingston, co-obligor on the February 10, 1988 note, remain liable for the debt and that the mortgages executed by Metal Masters securing the February 10, 1988 note remain intact and secure the continued debt obligation of J. Scott Livingston evidenced by the March 20, 1989 note.

Debtor cites Nolin Production Credit Ass'n, supra, in support of his novation argument. In that case a husband and wife executed a note secured by a first mortgage on real property in favor of a bank. A few years later, the husband alone executed a another note secured by another mortgage on real estate (other than that securing the first note), paying off the first note. Based on the facts in that case, the Kentucky Court of Appeals determined it was the intent of the parties to extinguish the debt evidenced by the first note. Id. at 467-68. Because this constituted a novation of the first note, the mortgage securing the first note was extinguished. Id. at 467. The facts in this case, however, are distinguishable from those in Nolin Production Credit Ass'n. In Nolin Production Credit Ass'n, the second note included an additional loan, a new debt, not covered by the first note whereas in this case, no new money was advanced in connection with the March

Administrator v. Smith, 63 S.W.2d 796 (Ky. App. 1933.)

20, 1989 note. Furthermore, in Nolin Production Credit Ass'n the court specifically noted that the second note made no mention of the

mortgage securing the first note being extended to cover the second note. Id. at 467. In this case, the March 20, 1989 note expressly provides that it is secured by two mortgages, dated November 29, 1986 and December 29, 1986, which are the two mortgages that secured the February 10, 1988 note. The deed transferring the real estate to J. Scott Livingston and Nita Livingston also expressly provides that the mortgages securing the outstanding indebtedness were assumed. While it is clear that the parties intended to release Metal Masters of any liability for the February 10, 1988 note, it is equally clear that they intended the liability of J. Scott Livingston on the February 10, 1988 note to continue and intended the mortgages securing his debt, which was not extinguished, to secure the March 20, 1989 note. No authority cited by debtor supports a finding of novation under Kentucky law based on the facts before me. I find debtor has failed to meet his burden of proof that novation occurred. The March 20, 1989 note was a renewal, not a novation, of the February 10, 1988 note. Therefore, the two mortgages securing the February 10, 1988 note, properly recorded pursuant to Kentucky law, secure the March 20, 1989 note and renewals thereof. KRS §382.520(1).

The mortgages were open of record at the time the bankruptcy was filed. Even though the mortgages were from Metal

Masters, the deed transferring ownership of the real estate to J. Scott Livingston and Nita Livingston provides that the Livingstons

assumed the mortgages. Ample notice of the pre-existing outstanding mortgages was provided a creditor or purchaser under Kentucky law. KRS §382.270, supra. The debtor, standing in the shoes of a hypothetical judgment lien creditor, 11 U.S.C. §544(a)(1) or (2), or bona fide purchaser, 11 U.S.C. §544(a)(3), had notice of the mortgages sufficient to subordinate his interest, the interest of a trustee in bankruptcy, to that of the mortgage holder, Citizens Bank.

Plaintiff also seeks damages from Citizens Bank for an alleged violation of the automatic stay. Citizens Bank does not dispute that post petition it proceeded with a hearing on its motion for summary judgment in the Kentucky State Court. Citizens Bank argues that the hearing constitutes a stay violation, if at all, by the Kentucky court. Further, Citizens Bank argues, the debtor was not prejudiced as a result of the hearing because he did not appear at the hearing and in any event the motion was denied. A bankruptcy petition operates as a stay against, among other things, the "continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the case under this title [11]" 11 U.S.C. §362(a)(1). Citizens Bank's post petition prosecution of its motion for summary judgment

in an action commenced prepetition against the debtor in another forum with knowledge of debtor's bankruptcy petition violated the automatic stay of §362(a). Citizens Bank's argument that the

Kentucky judge is responsible for the stay violation is without merit. "The [motion for summary judgment] was brought by [Citizens Bank], carried to hearing by [Citizens Bank] after [it] had knowledge of the debtor's bankruptcy filing, and urged by [Citizens Bank] at hearing." Carver v. Carver, et al. (In re: Carver), Ch. 13 case No. 89-10203 Adv. No. 89-1043 slip op. at 9 (Bankr. S.D. Ga. June 13, 1990). Further, the fact that the stay did not apply to the co-defendants in the Kentucky action did not make it permissible for Citizens Bank to continue prosecuting its complaint against the debtor. It was incumbent upon Citizens Bank upon receiving notice of debtor's bankruptcy petition to notify the Kentucky court and seek a continuance of the hearing on its motion for summary judgment or otherwise take whatever steps were necessary to suspend further prosecution of its complaint against the debtor, and then seek relief from the stay in this court to go forward in the Kentucky action. Instead, Citizens Bank disregarded the automatic stay and proceeded with the summary judgment hearing seeking to foreclose its interest in property of the bankruptcy estate.

Bankruptcy Code §362(h) provides that "[a]n individual injured by any willful violation of [the] stay . . . shall recover actual damages, including costs and attorneys' fees, and, in

appropriate circumstances, may recover punitive damages." "Willful" as used in §362(h) does not require a showing of a conscious intent to harm. What is required is a showing that the party knew of the

filing of the bankruptcy petition and with that knowledge, acted intentionally or deliberately. In re: Atlantic Business and Community Corp., 901 F.2d 325, 329 (3rd Cir. 1990); In re: Blume, 875 F.2d 224, 227 (9th Cir. 1989); Aponte v. Aungst (In re: Aponte), 82 B.R. 738, 742 (Bankr. E.D. Pa. 1988); In re: Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985); Burnett v. Danz Cars Inc., et al. (In re: Burnett), Ch. 13 case No. 91-11600 Adv. No. 91-1096 (Bankr. S.D. Ga. Dalis, J. Feb. 3, 1992). In this case, Citizens Bank knew of J. Scott Livingston's Chapter 11 petition and with that knowledge, proceeded with an action against J. Scott Livingston in another forum. Citizens Bank's actions constitute a "willful" violation of the automatic stay.

Section 362(h) provides for an award of actual damages, including attorney's fees, for a willful violation of the stay. A debtor seeking the protection of the bankruptcy court expects and is entitled to the protection afforded by §362(a) of the Bankruptcy Code. The willful breach of that protection by a creditor gives rise to damages. See Pettitt v. Baker, 876 F.2d 456 (5th Cir. 1989); Burnett, supra, slip op. at 17-18. However, under the facts of this case the debtor is not entitled to damages. The debtor was

not prejudiced as a result of the hearing since he did not appear at the hearing, did not expend any money in response to the hearing

notice and the motion was denied.¹⁰ In this case Citizens Bank's violation of the automatic stay of §362(a) does not warrant an award of damages to the debtor.

It is therefore ORDERED that judgment is entered in favor of defendant, Citizens Bank;

further ORDERED that the claim of Citizens Bank in the underlying Chapter 11 case is secured by a first in priority mortgage on the real estate known as Lot No. 30 Shannon Oaks Subdivision, Mercer County, Kentucky;

further ORDERED that Central Bank's lien on the real estate is subordinate to the lien of Citizens Bank.

No monetary damages are awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th day of March, 1992.

¹⁰I further note that this was not a consumer transaction and that the foreclosure did not involve the debtor's homeplace.

